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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JUNE TERM. 1963

No. [redacted] 178

LOCAL NO. 201, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO) and DONALD F. BRUSTAD, individually and as President of said Local No. 201;
Petitioners,

vs.

CITY OF MUSKEGON, a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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(Numbers in parentheses followed by letter "a" indicate pages of the appendix of defendant-appellant, respondent here, filed in the Court below unless otherwise clearly identified. Lower case roman numerals in parentheses indicate pages of the Appendix attached hereto).

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered March 7, 1963.

OPINIONS BELOW

The opinion of the Honorable Noel P. Fox, Judge of the Circuit Court for the County of Muskegon (Michigan) in the Chancery action which framed the issues that form the basis of this petition is not officially reported but may

be found in the record prepared for use of the Court below (77a). The Opinion of the Supreme Court of the State of Michigan (i) is reported at 369 Mich. 384, 120 N. W. 2nd 197.

JURISDICTION

The judgment of the Supreme Court of Michigan (xii) reversing the Decree of the Circuit Court for the County of Muskegon (196a) and remanding the cause to it with directions to dismiss was entered on March 7, 1963. The jurisdiction of this Court is invoked under 28 *U. S. C.* 1257 (3).

QUESTION PRESENTED

May the City of Muskegon constitutionally restrain the free association of its police officers by forbidding membership in and requiring resignation from their labor organization or from any organization in any manner identified with any federation or labor union which admits to membership persons who are not members of the Muskegon Police Department in the absence of a showing of compelling public necessity or clear and present danger?

The Circuit Court for the County of Muskegon answered "No."

The Supreme Court of the State of Michigan answered "Yes."

Petitioners respectfully contend that the answer should be "No."

CONSTITUTIONAL PROVISIONS INVOLVED

1. *United States Constitution, Amendment* I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. *United States Constitution, Amendment* XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Chronology and History of the Litigation.

For approximately seven years prior to March, 1961 a majority of the police officers employed by the City of Muskegon have been members of Local No. 201 of the American Federation of State, County and Municipal Employees (AFL-CIO) comprised of governmental employees of the City of Muskegon, the County of Muskegon and the surrounding municipalities and townships (231a, 232a). Of approximately 45 to 50 Muskegon Police Officers eligible for membership in Local No. 201, 35 are members (232a, 233a). The President of Local No. 201 is petitioner, Muskegon Police Officer Donald F. Brustad (231a).

The City of Muskegon has not at any time opposed membership in Local No. 201 by any of its employees, including police officers (221a), and has actually checked off the dues of police as well as other members of the Local (230a). No claim has been made over the years by anyone that union membership has adversely affected the police officers' performance of their duties (222a, 242a).

On Monday, March 13, 1961 at a "Service Committee" meeting of the City of Muskegon (City Commission meeting behind closed doors) in the office of the City Manager, one of the City Commissioners proposed the prohibition of union membership by policemen (218a). On Tuesday, March 14th at its regular meeting, the Muskegon City

Commission adopted by a vote of 5 to 2 Resolution No. 61-155. Its operative language provided:

> "No police officer of the City of Muskegon Police Department shall hereafter be, or become, a member of any organization in any manner identified with any Federation or Labor Union which admits to membership persons who are not members of the Muskegon Police Department, or which would in any way exact prior consideration and prevent such officer from performing full and complete police duty at any time. Any Police Officer now a member of such unions shall disassociate himself within thirty days from this date. Failure to comply will constitute reason for immediate dismissal." (57a, 58a).

The Muskegon Police Chief immediately issued a departmental rule in identical terms (203a, 61a, 62a).

On April 7, 1961, one week before the effetive date of the regulation, these petitioners filed a Chancery action (No. 29416) seeking an injunction to prevent implementation of the resolution, as threatened, on April 14, 1961.* A temporary restraining order was issued in the Chancery action on April 17, 1961 (70a).

On April 13, 1961 plaintiff filed an amended and supplemental bill of complaint in the Chancery action (58a-70a), asserting as grounds for relief that the proposed regulation violated various Michigan statutes and constitutional provisions as well as Articles I and XIV of the amendments to the Constitution of the United States. It is upon this amended and supplemental bill of complaint that the issue here before this Court was joined in the Circuit Court

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*A parallel mandamus action was filed (Muskegon County Law No. 16850) between substantially these same parties to compel submission of the issue to the electorate and was litigated concurrently with this action. The Circuit Court ruled adversely to plaintiffs in that action; no appeal was taken. The mandamus issues are not presented here but mention is made of the existence of that action to explain the numerous references to it in the title and body of the record prepared for the use of the Court below.

and upon which that Court issued its opinion on October 24, 1961 (77a et seq.). For the various reasons therein stated, the Circuit Court held that the action of the respondent was unconstitutional and void, and on November 20, 1961 issued its decree permanently enjoining the City from giving effect to Resolution No. 61-165 or any regulation or rule adopted by the Muskegon Police Department or any other city agency pursuant thereto or in accordance therewith (196a).

An appeal was regularly taken by the respondent City to the Supreme Court of the State of Michigan and briefs and arguments were received. (The American Civil Liberties Union of Michigan was given leave to file a brief Amicus Curiae). On March 7, 1963 the Michigan Supreme Court issued its opinion and order reversing the decree of the Circuit Court and remanding the cause for entry of an order of dismissal (xii).

B. Presentation of the Federal Question.

Violation of Article I and Article XIV of the Amendments to the Constitution of the United States was first asserted by petitioner in his amended and supplemental bill of complaint filed April 13, 1961 (67a, 68a). The presentation of this question was expressly recognized by the Muskegon County Circuit Court in its opinion (77a, et seq.), wherein it held among other things that the proposed regulation deprived the police officer plaintiff of freedom of speech and assembly. The Federal question was briefed by both parties in the Michigan Supreme Court and that Court at least recognized that such issues had been presented by observing in its opinion that:

> "the burden rests on those assailing it to establish that there is an unwarranted, and therefore arbitrary, interference with rights protected by constitutional guaranties" (v).

REASONS FOR GRANTING THE WRIT

A. Importance of the policy question.

Despite the legal raiment in which the issue finds itself, the question asked of this Court herein is basically one of philosophy or policy, and is perhaps one of the half-dozen such questions most likely to continue to vex twentieth century man during the foreseeable future: *To what extent will government in an open society be permitted to undertake prophylactic regulation of the speech, association, religious practice, and reading habits of the citizenry in the absence of a showing that such pre-censorship is justified by an overwhelming public urgency?*

All aspects of this question are not here presented but a critical case is, for here we are not only concerned with the right of policemen to maintain their membership in their labor union but the extent to which regulation of the lives of public officials is justified by the fear that they may otherwise betray their public trusts.

The argument advanced by the municipality in this case is that police officers, unless prohibited from membership in a labor union which is affiliated with workers in other fields, will exhibit "split loyalty" when called upon to police labor disputes.* If the relatively weak brotherhood of common union affiliation is feared as a source of split loyalty, how much more to be feared are the incomparably stronger bonds of religion, blood relationship, political affiliation, race, social friendship? If a municipality may freely engage in prophylactic regulation of the union affiliation of its police officers lest they be tempted to favoritism, it should be able by appropriate regulation to specify the religion, the race or the political affiliation of a policeman; it should be able to forbid his membership in the Masons, the Catholic Church, the NAACP and the American Legion for this same reason. This Court with its answer to the question herein posed will cast light upon whether these other associations with their incom-

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*It is emphasized that there is no evidence in the record which would justify this assumption.

parably stronger danger of split loyalty may also be regulated as to police officers.

And if society is fatally vulnerable to the dereliction of police officers affected by split loyalty, how much more vulnerable is it to public officials whose functions are broader, whose discretion is greater, whose power is more critical to its existence? City Commissioners, Circuit Judges, Supreme Court Justices are by this logic much more vulnerable to regulation of association and affiliation, since in them, split loyalty might be truly catastrophic to society.

If regulation of the associations of police officers into labor unions is constitutional because it is necessary as a measure of social self-preservation, how can it be denied that even more stringent regulation of the associations of higher officials is likewise constitutional?

B. Importance of the specific legal question.

Governmental employees, in general, and police officers, in particular, are entitled to know how and with whom they may associate in labor organizations without restraint from their employers. The decisions of the various state courts of last resort on the question of unionism among police officers, none of which has been reviewed by this Court, are, with the single exception of the case at bar, all cases decided prior to 1947. In view of the substantial developments of the law with respect to freedom of association since 1958,* a fresh look, and for this Court a first look, at the right of freedom of association in the context of government employment would seem to be highly justified, and would be of direct benefit to several million government employees and their governmental employers.

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*See, e.g., *NAACP vs. State of Alabama*, 357 U. S. 449, 78 Sup. Ct. 1163 (1958); *Bates vs. City of Little Rock*, 361 U. S. 516, 80 Sup. Ct. 412 (1960); *Louisiana vs. NAACP*, 366 U. S. 293, 81 Sup. Ct. 1333 (1961).

LEGAL ARGUMENT

A. A Municipal Police Officer has a Constitutionally Protected Right to Freedom of Association.

Freedom of association is secured to all persons within the jurisdiction of the respective states and is insulated from state impingement by the due process clause of the Fourteenth Amendment as an aspect of free speech, free press and the right of peaceable assembly. *NAACP vs. State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163 (1958):

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undoubtedly enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. DeJonge v. Oregon, supra; Thomas v. Collins, 323 U. S. 516, 530, 89 L. ed. 430, 444, 65 S. Ct. 315. 'It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Fourteenth Amendment which embraces freedom of speech.' See Gitlow v. New York, 268 U. S. 652, 666, 69 L. ed. 1138, 1145, 45 S. Ct. 625; Palko v. Connecticut, 302 U. S. 319, 324, 82 L. ed. 238, 291, 58 S. Ct. 149; Cantwell v. Connecticut, 310 U. S. 296, 303, 84 L. ed. 1213, 1217, 60 S. Ct. 900, 128 A. L. R. 1352; Staub v. Baxley, 355 U. S. 315, 321, 2 L. ed. 302, 78 S. Ct. 277. Of course, it is immaterial whether the belief sought to be advanced by association pertains to political, economic, religious or cultural matters, and State action which may have the effect of curtailing freedom of association is to be closely scrutinized. * * *" (78 Sup. Ct. 1171).

Accord: *Bates vs. City of Little Rock*, 361 U. S. 516, 80 Sup. Ct. 412 (1960); *Louisiana vs. NAACP*, 366 U. S. 293, 81 Sup. Ct. 1333 (1961).

There is no question that municipal action is State action within the meaning of the constitutional prohibition. *Staub vs. City of Baxley*, 355 U. S. 313, 78 Sup. Ct. 277

(1958); *Lovell vs. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938). And it is clear that this constitutional protection extends to a public servant in his right to continue in the enjoyment of his occupation. *Wieman vs. Updegraff*, 344 U. S. 183, 73 Sup. Ct. 215 (1952); *Shelton vs. Tucker*, 364 U. S. 479, 81 Sup. Ct. 247 (1960).

We believe that one of the fundamental errors into which the Supreme Court of the State of Michigan fell is its failure to note and give proper weight to this latter principle of constitutional law, as exemplified by its statement:

> "The restriction imposed is not directed at a class as such but, rather, solely at those who have sought and obtained employment in the police department of the defendant City" (v).
>
> "* * * there is no provision of either state or federal constitution which gives to individuals the right to be employed in government service or the right to continue therein" (ix).
>
> "As before suggested they cannot claim a constitutional right to be appointed as members of said department, or to continue therein" (x).

The Michigan Supreme Court seems to have converted the axiomatic principle that there is no constitutional right to be a policeman into a holding that the City may therefore lay an unconstitutional burden upon that employment. Contra: *Wieman vs. Updegraff*, supra, and *Shelton vs. Tucker*, supra.

B. In the absence of an affirmative showing of clear and present danger or an overriding public interest, municipalities may not regulate the associations of police officers.

The second fundamental error into which we believe the Supreme Court of the State of Michigan has fallen is in its contention that:

> "the burden rests on those assailing it [the regulation] to establish that there is an unwarranted, and

therefore arbitrary, interference with rights protected by constitutional guaranties" (v).

And that:

> "plaintiffs herein have not borne the burden of proof of showing that members of the police department of Muskegon are deprived by the enforcement of the regulation in question of any constitutional rights to which they are entitled" (x).

We believe this is a fundamental misconception of the issue.

Where first amendment freedoms are involved, the government must justify its regulation. The law on this subject is clearly stated by the United States Supreme Court in *Bates vs. Little Rock*, supra (1960):

> "We conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause." (361 U. S. 527).
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> "Decision in this case must finally turn, therefore, on whether the Cities, as instrumentalities of the State, have demonstrated so cogent an interest in obtaining and making public the membership list of those organizations as to justify the substantial abridgement of associational freedoms which such disclosure will effect. Where there is a significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling." (361 U. S. 524).

And see *NAACP vs. Alabama*, supra (1958):

> "It [NAACP] contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justi-

fied only upon some overriding valid interest of the State." (357 U. S. 460).

* * *

"We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. See American Communications Ass'n v. Douds, supra, 339 U. S. at page 400; 70 S. Ct. at page 684; Schneider v. State, 308 U. S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155. Such a '* * * subordinating interest of the State must be compelling,' Sweezy v. New Hampshire, 354 U. S. 234, 265, 77 S. Ct. 1203, 1219, 1 L. ed. 2d 311 (concurring opinion)." (357 U. S. 463).

The cases, we believe, effectively dispose of the issue of *who* must present the evidence in justification of the regulation. Clearly, it is the City. This record discloses no attempt to do so.

This Court has also spoken on the subject of *what* such justifying evidence must be. In a line of history making decisions it has declared that a legislative regulation, Federal or State, which purports to foreclose a constitutional liberty is invalid in the absence of a showing of *"clear and present danger"* to the orderly processes of government. This doctrine was first announced by this Court in *Schenck vs. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919):

"Thus the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

See Holmes, J. dissenting in *Abrams vs. U. S.*, 250 U. S. 616, 630, 40 Sup. Ct. 17 (1919) and in *Gitlow vs. New York*, 268 U. S. 652, 673, 45 Sup. Ct. 625 (1925). And

this test was clearly accepted by the entire Supreme Court in *Bridges vs. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); *Thornhill vs. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940). And see Brandeis, J. concurring in *Whitney vs. California*, 274 U. S. 357, 376, 47 Sup. Ct. 641 (1927); *Herndon vs. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1937); *Cantwell vs. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1940); Black J. dissenting in *Communist Party vs. Subversive Activities Control Board*, 367 U. S. 1, 81 Sup. Ct. 1357 (1961); Black, Douglas and Warren, JJ. dissenting in *Konigsberg vs. State Bar*, 366 U. S. 36, 56, 81 Sup. Ct. 997 (1960); *Wood vs. Georgia*, 370 U. S. 375, 82 Sup. Ct. 1364 (1962).

It is conceded that this Court has at other times adhered to a test of perhaps less scope, but one which nevertheless clearly condemns the City's action in the case at bar. At the very least, a purported regulation must be shown to carry a "compelling subordinating public interest" as its justification. *Bates vs. Little Rock*, supra; *Sweezy vs. New Hampshire*, 354 U. S. 234, 77 Sup. Ct., 203 (1957) (concurring opinion); *NAACP vs. Alabama*, supra. The respondent here has shown *no* evidence of *any* danger or *any* compelling interest. (cf. opinion of Circuit Judge at 151a, 153a):

> "The assumption made by the defendant City, that is the majority of the Commission, is predicated upon an unproven assumption of wrong-doing. The record is void of any evidence to support such a conclusion or such a presumption" (153a).

The Michigan Supreme Court did not assert in its opinion that the record demonstrated public danger or any compelling interest but *assumed* that the City Commission's attitude was justified:

> "It may be assumed that in taking the action in question due consideration was given to local conditions and to the protection of the public interest generally" (v).

It is true that the majority of the City Commission made some effort to bolster its case by a preamble to its resolution of March 14, 1961 (iii), asserting that the majority feared the problem of "split loyalty."* But we respectfully submit that there must be something more than a vague apprehension of harm by a governmental body to justify its direct invasion of a constitutionally denied sphere of legislative activity. It is, we submit as a matter of abstract logic, highly doubtful that a stated apprehension of harm can be justified in the absence of some showing that such harm has actually occurred somewhere, sometime, under some circumstances.

C. The city's proposed regulation is unconstitutionally broad.

Perhaps the most striking feature of the City's regulation is its extreme broadness of scope where obviously a much narrower one (or no additional legislation at all) would do to meet the harm apprehended. Where society can be protected by a narow regulation carefully drawn so as to minimize interference with constitutionally protected freedoms, a broader invasion of such freedoms will be stricken down.

In *Shelton vs. Tucker*, supra the Supreme Court held a State law requiring public school teachers to disclose *all* organizations to which they have belonged over a five year period unconstitutional as an interference with freedom of association. The Court noted that the avowed purpose of protecting schools from teacher unfitness and subversion might be fully achieved by a requirement much narrower and more precise in both aim and impact:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate

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*"But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance." *Bates vs. Little Rock*, supra.

and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (364 U. S. 488).

• • •

"The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (364 U. S. 490).

See: *Lovell vs. Griffin*, supra; *Schneider vs. Irvington*, 308 U. S. 147, 60 Sup. Ct. 146 (1939); *Cantwell vs. Connecticut*, supra; *Martin vs. Struthers*, 319 U. S. 141, 63 Sup. Ct. 862 (1943); *Saia vs. New York*, 334 U. S. 558, 68 Sup. Ct. 1148 (1948); *Talley vs. California*, 362 U. S. 60, 80 Sup. Ct. 536 (1960).

In *Louisiana vs. NAACP.* supra, Mr. Justice Douglas for a unanimous Court noted:

"We are in an area where, as *Shelton v. Tucker*, [citation] emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '• • • even though the governmental purpose being legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" (366 U. S. 296).

Compare the affirmance of narrow regulation in *Communist Party vs. Subversive Activities Control Board*, supra, and *United States vs. Harriss*, 347 U. S. 612, 74 Sup. Ct. 808 (1954).

Circuit Judge Fox in his opinion observed that although "split loyalty" and failure to carry out one's duty is

what the City Commission *said* it feared, what it *did* was to prohibit all meaningful association:

> "As freedom of the press must remain unabridged, responsible only for abuses, such as libel, obscenity and pornography, so also must freedom of association remain unabridged, save only for abuses. The right must remain, the abuse, only, must go or be controlled.
>
> "So it is with a Police Officer. He may exercise his freedom of association. He may become and remain a member of a legitimate federated governmental employees' association. Mere membership, alone, is not punishable as an offense.
>
> "However, if, as a Police Officer, he so uses his membership or he permits his membership to so influence his actions that his conduct while engaged in the discharge of his duties constitutes a failure to perform his duty impartially, and this failure amounts to malfeasance, nonfeasance or misfeasance, he may be punished for this particular abuse, and a regulation narrowly drafted to reach this abuse may be valid. He may be subject to disciplinary action, even to the extent of being discharged from his employment" (150a, 151a).
>
> • • •
>
> "This evil, namely, of a Police Officer performing his official acts in a partial or biased manner cannot be regulated by means which broadly stifle fundamental personal liberties, such as freedom of association" (155a).

As a practical matter, it is undoubted that the Police Chief possesses the inherent authority to discipline for improper performance of duty without the necessity for writing a specific regulation on the subject. If more is desired, a narrow, explicit and precise regulation of police favoritism would surely be valid.

SUMMARY

It is respectfully asserted that the Fourteenth Amendment to the United States Constitution, embracing as it does those rights essential to a scheme of ordered liberty, will strike down state legislative restriction upon freedom of association, in the absence of proof by the legislating authority of a clear and present danger of evils which it has the right to prevent or of an overriding governmental necessity which justifies its invasion of this constitutionally protected field. And irrespective of any showing, such regulation will only be upheld where it invades to the least degree possible the protected constitutional area and is so narrowly drawn that it reaches only the evil apprehended.

We respectfully submit that judged by these standards, the action of the City Commission must be struck down.

CONCLUSION

For the foregoing reasons, it is requested that this petition for a writ of certiorari to the Supreme Court of the State of Michigan be granted.

Respectfully submitted,

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